UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD
REGION 9

STEIN, INC.	Case No. 09-CA-214633
	Case No. 09-CA-215131
Respondent; and	Case No. 09-CA-219834
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18	Case No. 09-CB-214595
	Case No. 09-CB-215147
Respondent; and	
TRUCK DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 100, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
Charging Party; and	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 534	
Charging Party.	

RESPONDENT INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S BRIEF IN OPPOSITION TO GENERAL COUNSEL'S MOTION IN LIMINE

Now comes Respondent, International Union of Operating Engineers, Local 18 ("Local 18"), and hereby submits its Brief in Opposition to the General Counsel's Motion in Limine. For the reasons more fully articulated herein, the General Counsel's Motion lacks merit and should therefore be denied.

Respectfully Submitted,

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BRIEF IN OPPOSITION

I. Introduction

The General Counsel's theory of liability against the Respondents depends upon showing that the collective-bargaining agreements ("CBA") that covered work performed at the AK Steel Middletown Works ("AK Facility") were valid under § 9(a) of the National Labor Relations Act ("Act"). To this end, the General Counsel bears the burden of producing evidence that the Charging Parties' collective-bargaining relationships at the AK Facility were the result of a Board-issued certification of representation or the product of a contractual voluntary recognition clause coupled with affirmative evidence of majority support. For its part, Local 18 asserted an affirmative defense that argues that the Complaint must fail because the General Counsel cannot prove a § 9(a) relationship. In support of its affirmative defense, the Union anticipates introducing evidence showing that the General Counsel will be unable to establish this critical § 9(a) showing because all the prior CBAs were expired "pre-hire" agreements entered into under § 8(f) of the Act.

Through its Motion in Limine, the General Counsel attempts to avoid its burden by arguing that both Local 18's and Stein's affirmative defenses are invalid as a matter of Board law, and thus any evidence adduced pertaining to this defense must be precluded because it is irrelevant and would unnecessarily burden the record and parties. However, this argument misses the mark and is unsupported by Board jurisprudence. Moreover, as a matter of Board precedent, resolving the 8(f) status of Stein and TMS through a Motion in Limine is inappropriate given that the attendant burden of proof regarding this issue can only be resolved at a ULP hearing. Even if it is ultimately determined that neither Stein nor TMS are 8(f) employers, this does not automatically convert their collective-bargaining relationship with the Charging Parties to a 9(a) arrangement, as the General Counsel wrongly asserts.

II. Law and Argument

The General Counsel misreads both *Engineered Steel Concepts, Inc.*, 352 NLRB 589 (2008) and Board jurisprudence generally by claiming that because neither TMS nor Stein are employers "engaged primarily in the building and construction" their collective-bargaining relationships with the Charging Parties must arise under § 9(a) of the Act. (GC MIL, p. 6.) It is a fundamental tenet of the Act that "[a] 9(a) relationship may be established in one of two ways, either through a Board-certified election, or through an employer's voluntary grant of recognition." *E.g., Woodworkers Local 1 (Glen Falls Contrs. Assn.)*, 341 NLRB 448, 453 (2004). To satisfy the latter option, "the party asserting the 9(a) relationship must unequivocally show that (1) the Union requested recognition as the majority or Section 9(a) bargaining representative of the unit employees; (2) the employer recognized the Union as the majority or Section 9(a) bargaining representative; and (3) the employer's recognition was based on the Union's having shown, or having offered to show, evidence of its majority support." *Id.*

Through its Motion in Limine, the General Counsel would read out this two-pronged approach to satisfying 9(a) status, and conveniently ignores the Board's acknowledgment that the voluntary recognition prong was satisfied in *Engineered Steel Concepts*. 352 NLRB at 602. During the investigation leading up to the Complaint in this matter, the Region confirmed to the parties that the Charging Parties never represented individuals employed by TMS pursuant to a Board-certified election. Similarly, the investigatory evidence adduced revealed that none of the CBAs entered into between the Charging Parties and TMS ever contained the requisite language to create a 9(a) relationship between the parties. In other words, these CBAs lacked language stating that TMS's "grant of recognition" to the Charging Parties was "express and unconditional" and that either Charging Party "'represents' a majority of unit employees[.]" *Staunton Fuel & Material*,

335 NLRB 717, 720 (2001). Despite the complete lack of evidence supporting a § 9(a) relationship, the General Counsel's Complaint still rests on the theory that Stein had bargaining obligations towards the Charging Parties under § 9(a). As such, Local 18's assertion that the Charging Parties only had 8(f) arrangements with TMS is clearly relevant. *See Aargano Elec. Corp.*, 248 NLRB 352, 358 (1980) (where Board, assuming *arguendo*, that employer's relationship with union arose in context of 8(f), it could only be converted to 9(a) by way of, *inter alia*, certification).

Moreover, the General Counsel betrays its own argument when it erroneously claims that, as the party "attempting to avail itself with the Section 8(f) exception," Local 18 has "[t]he burden of proof in establishing whether an employer is primarily engaged within the building and construction industry[.]" (GC MIL, p. 3.) Even if this assertion was correct, it necessarily assumes that Local 18 is entitled to satisfy this burden at the ULP hearing. *See Belle Steel Co., Inc.*, 135 NLRB 1378, 1379 (1962), fn. 2 (where a party has the burden of proof, it is not entitled to take further evidence after the hearing closes because it is required to meet that burden "at the hearing" or "request additional time at the hearing" to satisfy it). As such, the General Counsel itself has effectively acknowledged that Local 18's claim is relevant to the issues being determined. Moreover, the Board has long held that when it is unclear whether an employer is one in the construction industry that would subject it to the provisions of § 8(f), "[t]he burden of showing that a bargaining relationship between a union and a construction industry employer is not an 8(f) relationship is on the party asserting 9(a) status." *E.g., Electri-Tech, Inc.*, 306 NLRB 707, 707 (1992), fn. 2. Thus, either way, the General Counsel's averment that § 8(f) is inapplicable cannot withstand scrutiny, as the General Counsel is itself required to fully flesh out the statutory status of Stein and TMS as part of its own case-in-chief.

Given these evidentiary concerns, a motion in limine is an inappropriate vehicle to address the §§ 8(f) and 9(a) arguments, as such motions do not afford the ALJ the full opportunity to discern the nature of a party's case-in-chief. *See Schuck Component Sys., Inc.*, 230 NLRB 838, 845-46 (1977) (as adopted by Board, ALJ denied party's motion in limine to suppress certain testimony in advance on the grounds they would constitute hearsay because it was not possible to know in advance the nature of the inquiry, and there were other avenues by which eliciting hearsay testimony could be avoided). While the General Counsel makes much of the fact that Stein and TMS are not § 8(f) employers because they perform slag delivery, it conveniently ignores the fact that Stein is involved in a plethora of other work, including slag processing, which could very well fall under the aegis of § 8(f). *See O'Daniel Trucking Co.*, 313 NLRB 18, 19 (1993) (even where majority of employer's work constituted slag delivery, it performed other construction work that subjected it to § 8(f)). At this juncture, it is inappropriate to assume, as the General Counsel effectively does, that Stein is not an 8(f) employer. Rather, in addition to being part of Local 18's defense to the Complaint, the determination of the Charging Parties status under either § 8(f) or § 9(a) is part of the General Counsel's burden in carrying its case-in-chief. *E.g., Electri-Tech, Inc.*, 306 NLRB at 707, fn. 2.

III. Conclusion

For all the foregoing reasons, Local 18 respectfully requests that the Administrative Law Judge deny the General Counsel's Motion in Limine.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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